

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL SAVETSKY, individually and)	Case No. 14-03514 SC
on behalf of all others similarly)	
situated,)	ORDER GRANTING MOTION TO
)	<u>COMPEL ARBITRATION</u>
Plaintiff,)	
)	
v.)	
)	
PRE-PAID LEGAL SERVICES, INC.)	
d/b/a LegalShield,)	
)	
Defendant.)	
)	
)	
)	
)	

I. INTRODUCTION

Now before the Court is Defendant LegalShield's¹ motion to compel Plaintiff Michael Savetsky to arbitrate his claims in this putative consumer class action. ECF Nos. 40 ("Mot."). The motion is fully briefed, ECF Nos. 53 ("Opp'n"), 57 ("Reply"), including a full round of supplemental briefing, ECF Nos. 60 ("Supp. Mot."), 61 ("Supp. Opp'n"), 63 ("Supp. Reply"), and because it is appropriate

¹ Defendant is actually named Pre-Paid Legal Services, Inc., but does business as LegalShield. For simplicity the Court will refer to Defendant as LegalShield.

1 for consideration without oral argument under Civil Local Rule
2 7-1(b). The hearing has already been VACATED per ECF No. 65. For
3 the reasons set forth below, the motion is GRANTED.

4
5 **II. BACKGROUND**

6 This is a putative consumer class action alleging that
7 LegalShield improperly charged recurring payments to its California
8 members for pre-paid legal services without providing sufficient
9 consent or disclosure. To provide legal services to its members,
10 LegalShield contracts with law firms in the states in which it
11 operates and, in exchange for a monthly fee, gives members access
12 to that network of law firms for certain types of legal services.

13 While LegalShield memberships are available directly to
14 consumers through its website, memberships are primarily sold
15 through "sales associates" -- independent contractors who sign up
16 to sell LegalShield memberships in exchange for commissions. ECF
17 No. 42 ("Pinson Decl.") at ¶ 6. While LegalShield did not realize
18 it until recently, Savetsky's involvement with LegalShield began
19 when he applied to be a sales associate online through an existing
20 LegalShield sales associate. After becoming a sales associate, he
21 then also purchased a LegalShield membership of his own.

22 The Court previously denied a motion to compel arbitration
23 under LegalShield's membership agreement, finding that Savetsky
24 never assented to the arbitration provision. ECF No. 33 ("Prior
25 Order") at 14. After the Court denied that motion, LegalShield
26 discovered that even prior to becoming a member, Savetsky signed up
27 to be a sales associate. In becoming a sales associate,
28 LegalShield contends Savetsky entered into an "associate agreement"

1 containing a separate and enforceable arbitration provision. See
2 Pinson Decl. Ex. A ("Associate Agreement") at 6. The entire
3 provision is lengthy, but the most relevant portion provides that:

4 [a]ll disputes and claims related to LegalShield, the
5 Associate Agreement, these Policies and Procedures and
6 any other LegalShield policies, products and services,
7 the rights and obligations of an Associate and
8 LegalShield, or any other claims or causes of action
9 between the Associate or LegalShield or any of its
10 officers, directors, employees or affiliates, whether
11 statutory in tort in contract or otherwise, shall be
12 settled totally and finally by arbitration in Oklahoma
13 City, Oklahoma, in accordance with the Commercial
14 Arbitration Rules of the American Arbitration
15 Association. However, Associate understands and
expressly agrees that LegalShield may seek a temporary
restraining order and/or preliminary injunction in
state or federal court to maintain the status quo
pending determination of the dispute. If any
Associate files a claim or counterclaim against
LegalShield or any of its officers, directors,
employees or affiliates in any such arbitration, an
associate shall do so only on an individual basis and
not with any other Associate or as part of a class
action

16 Id. at ¶ 23. As a result, LegalShield asks the Court to compel
17 Savetsky to arbitrate the claims he asserts in this case in an
18 individual arbitration, and stay or dismiss the case pending the
19 resolution of that individual arbitration. Savetsky opposes,
20 arguing that the Court lacks jurisdiction to compel arbitration,
21 the agreement is unenforceable, or it does not cover the claims at
22 issue in this case.

23 In reviewing the underlying agreement, the Court previously
24 noted that the relevant Associate Agreement -- which includes the
25 arbitration clause now at issue -- stated that it "will be governed
26 by and construed in accordance with the laws of the State of
27 Oklahoma." ECF No. 42 ("Pinson Decl.") at 6, ¶ 23. Accordingly,
28 the Court ordered a round of supplemental briefs, ECF No. 58, which

1 the parties have provided. Defendant -- who during the initial
2 round of briefs agreed that California law applied -- now asserts
3 Oklahoma law should be applied, whereas Plaintiff continues to seek
4 the application of California law.

5
6 **III. LEGAL STANDARD**

7 Section 4 of the Federal Arbitration Act ("FAA") permits "a
8 party aggrieved by the alleged failure, neglect, or refusal of
9 another to arbitrate under a written agreement for arbitration [to]
10 petition any United States district court . . . for any order
11 directing that . . . arbitration proceed in the manner provided for
12 in [the arbitration] agreement." 9 U.S.C. § 4. The FAA embodies a
13 policy that generally favors arbitration agreements. Moses H. Cone
14 Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
15 The burden on a motion to compel arbitration is on the party
16 opposing arbitration, Edwards v. Metropolitan Life Ins. Co., No. C
17 10-03755 CRB, 2010 WL 5059553, at *4 (N.D. Cal. Dec. 6, 2010)
18 (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227
19 (1987)), and the Court must resolve any doubts in favor of
20 arbitration. See Mitsubishi Motors Corp. v. Soler Chrysler-
21 Plymouth, Inc., 473 U.S. 614, 626 (1985).

22 To determine whether a valid arbitration agreement exists, we
23 "apply ordinary state-law principles that govern the formation of
24 contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S.
25 938, 944 (1995). Where the parties do not agree on which state law
26 governs, the court makes the determination by "using the choice-of-
27 law rules of the forum state, which in this case is California."
28 Pokorny v. Quixtar, Inc., 601 F.3d 987, 994 (9th Cir. 2010).

IV. DISCUSSION

Unlike the prior motion to compel arbitration, Plaintiff Savetsky does not argue that he did not assent to the arbitration provision contained in the Associate Agreement. Instead, he contends that LegalShield's motion should be denied because: (1) it seeks to re-litigate arguments the Court rejected in the prior motion to compel arbitration, (2) the Court lacks jurisdiction to decide the motion to compel, (3) the parol evidence rule bars consideration of anything aside from the specific membership agreement at issue in Plaintiff's substantive claims, (4) the Associate Agreement by its own terms does not apply to Plaintiff's claims, and (5) even if the agreement does apply to his claims, it is unconscionable and thus unenforceable.

The Court will address the jurisdictional and relitigation concerns, and then evaluate choice-of-law before turning to the arguments on parol evidence, the scope of the associate agreement, and unconscionability.

A. Jurisdiction

Section 4 of the Federal Arbitration Act provides for "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (emphasis added). Once filed, the court must determine whether a valid agreement to arbitrate exists and, if so, "make an order directing the parties to proceed to arbitration in accordance with the terms of the

1 agreement." Id. Finally, Section 4 states that "[t]he hearing and
2 proceedings, under such agreement, shall be within the district in
3 which the petition for an order directing such arbitration is
4 filed." Id.

5 Seizing on the final quoted language, Plaintiff argues that
6 because the Associate Agreement provides for arbitration only in
7 Oklahoma City, Oklahoma, LegalShield may only seek to compel
8 arbitration there. Thus, he concludes, "this Court has no
9 jurisdiction to grant Defendant's motion to compel." Opp'n at 9.

10 Plaintiff is mostly incorrect. While he rightly points out
11 that the Court has authority only to order arbitration within the
12 Northern District of California, that does not mean the court lacks
13 jurisdiction to compel arbitration at all. See Textile Unlimited,
14 Inc. v. A., BMH & Co., Inc., 240 F.3d 781, 785 (9th Cir. 2001)
15 ("[B]y its terms, [Section] 4 only confines the arbitration to the
16 district in which the petition to compel is filed. It does not
17 require that the petition be filed where the contract specified
18 that the arbitration should occur.") (emphasis added) (citing
19 Cont'l Grain Co. v. Dant & Russell, 118 F.2d 967, 969 (9th Cir.
20 1941)). On the contrary, if the Court finds that a valid agreement
21 to arbitrate exists, the FAA requires the Court to compel
22 arbitration. See 9 U.S.C. § 4 ("The court . . . , upon being
23 satisfied that the making of the agreement for arbitration . . . is
24 not in issue, . . . shall make an order directing the parties to
25 proceed to arbitration") (emphasis added). At the same
26 time, however, Ninth Circuit precedent prevents the Court from
27 ordering the parties to arbitrate in their chosen venue when, as
28 here, the motion to compel arbitration is filed outside the

1 district encompassing that venue. See Cont'l Grain, 118 F.2d at
2 968-69; see also Beuperthuy v. 24 Hour Fitness USA, Inc., No. 06-
3 0715-SC, 2012 WL 3757486, at *5 (N.D. Cal. July 5, 2012); Homestake
4 Lead Co. v. Doe Run Res. Corp., 282 F. Supp. 2d 1131, 1143-44 (N.D.
5 Cal. 2003).²

6 In short, while the Court has jurisdiction to compel
7 arbitration, it lacks jurisdiction to compel arbitration in
8 Oklahoma City. As a result, this argument is unavailing.

9 **B. Relitigation**

10 Next, Plaintiff contends that LegalShield's motion to compel
11 should be denied as it is an improper attempt to relitigate issues
12 the Court rejected when it denied LegalShield's motion to compel
13 under the membership contract and denied leave to file a motion for
14 reconsideration of that order. See Mot. at 7-8; see also Prior
15 Order at 14; ECF No. 48 ("Recons. Mot.") at 9.

16 The Court disagrees. First, no authority the Court has found
17 states that the denial of a prior motion to compel arbitration
18 under a different agreement somehow bars the proponent of the prior
19 motion from subsequently asserting that a different contract
20 contains an enforceable arbitration provision. True, a party may
21 waive its right to file a motion to compel arbitration if, while
22 knowing of its right to compel arbitration, it acts inconsistently
23 with that right, and prejudices the opposing party. See Sovak v.
24 Chugai Pharmaceutical Co., 280 F.3d 1266, 1270 (9th Cir. 2002).

25 But LegalShield has consistently and promptly asserted its argument
26 that the parties agreed to arbitrate their disputes, whether in the

27 ² Plaintiff's argument is still further weakened by the Court's
28 ultimate conclusions in this case, which includes striking the
language which requires that arbitration be conducted in Oklahoma.

1 membership agreement or the associate agreement. Furthermore,
2 contrary to Savetsky's characterization of the Court's prior
3 orders, the Court has never addressed whether the arbitration
4 provision in the associate agreement is valid and enforceable. As
5 a result, Plaintiff's suggestions that this is simply an improper
6 motion for reconsideration or an attempt to relitigate issues
7 previously decided are misplaced.

8 **C. Choice-of-Law**

9 Plaintiff urges strict application of California law on the
10 basis of waiver, that the contract was one of adhesion, and that
11 the choice of law provision cannot be enforced under the principles
12 of Section 187(2) of the Restatement (Second) of Conflict of Laws.
13 Failing that, Plaintiff argues that the arbitration clause is
14 unenforceable even under Oklahoma law, and even if enforceable that
15 the arbitration clause should not be read to apply to the
16 Membership Contract. Defendant disputes all such arguments. The
17 Court will address the first three arguments in turn. The fourth
18 argument is moot, and thus the Court does not reach it. The fifth
19 is substantially similar to and thus addressed later in connection
20 with Plaintiff's arguments relating to scope of the agreement.

21 **1. Waiver**

22 Plaintiff argues that where a party fails to assert the laws
23 contained in a choice of law provision, the forum state's laws
24 apply by default. See Peleg v. Neiman Marcus Grp., Inc., 204 Cal.
25 App. 4th 1425, 1442 (2012). Therefore, had the Court never ordered
26 supplemental briefing, Plaintiff would be correct that default
27 application of California law would be proper. Here, however, the
28 Defendant has asserted the laws from the choice-of-law provision.

1 While the Court does question why Defendant waited so long to
2 assert their choice of law and notes that Defendant did previously
3 agree to apply California law, the Court cannot now entirely ignore
4 Defendant's choice to assert an on-its-face valid provision of the
5 contractual agreement when filing a briefing the Court itself
6 specifically requested. Accordingly, there was no waiver.

7 2. Adhesion Contracts

8 Adhesion contracts are frequently enforced within California
9 and throughout the United States. Plaintiff's assertion that
10 substantial injustice results from such a contract runs counter to
11 the Supreme Court decision in Concepcion and other authorities.
12 See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Reply
13 at 7. The Court has previously engaged in a detailed analysis of
14 law relating to clickwraps, shrinkwraps, and browsewraps. Order of
15 the Court filed February 12, 2015, ECF No. 33, 6-8. The contract
16 at issue bears a few of the hallmarks of browsewrap (Plaintiff had
17 to affirmatively click a link to see the terms and conditions), but
18 otherwise looks like clickwrap. Plaintiff sought out the all-
19 digital agreement, was asked whether he agreed to the terms
20 associated -- where the terms were hyperlinked within the question
21 itself should he have chosen to review them -- and then clicked his
22 acknowledgement and agreement to the terms of the contract. This
23 shows sufficient "mutual manifestation of assent, whether by
24 written or spoken word or by conduct, [to satisfy] the touchstone
25 of contract." Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175
26 (9th Cir. Aug. 18, 2014). Nguyen specifically cites approvingly
27 that Courts find the requisite notice "where the user is required
28 to affirmatively acknowledge the agreement before proceeding with

1 use of the website." Id. at 1176. Therefore, the Court rejects
2 Plaintiff's adhesion argument at this juncture, though revisits the
3 issue in connection with unconscionability.

4 3. Restatement Principles

5 "California courts shall apply the principles set forth in
6 Restatement [S]ection 187, which reflects a strong policy favoring
7 enforcement of [choice-of-law] provisions." Nedlloyd Lines B.V. v.
8 Superior Court, 3 Cal. 4th 459, 464-465 (Cal. 1992); see also Wash.
9 Mut. Bank, FA v. Super. Ct., 24 Cal. 4th 906, 914-916 (Cal. 2001)
10 (applying Nedlloyd); Pokorny, 601 F.3d at 994 (applying Wash. Mut.
11 Bank). Section 187(2) of the Restatement (Second) of Conflict of
12 Laws requires enforcement of choice-of-law provisions except where:

13 (a) the chosen state has no substantial relationship
14 to the parties or the transaction and there is no
 other reasonable basis for the parties choice, or

15 (b) application of the law of the chosen state would
16 be contrary to a fundamental policy of a state which
17 has materially greater interest than the chosen state
 in the determination of the particular issue.

18 Courts are first to check prong (a), then consider whether the
19 foreign state's laws are contrary to a fundamental policy, and only
20 then consider whether California has a "materially greater
21 interest" in applying its own laws. See Bridge Fund Capital Corp.
22 v. Fastbucks Franchise Corp., 622 F.3d 996, 1002-03 (9th Cir.
23 2010).

24 i. Substantial Relationship

25 Here, Defendant is an Oklahoma corporation whose principle
26 place of business is in Oklahoma. California courts and the Ninth
27 Circuit have endorsed that this is sufficient analysis for finding
28 a substantial relationship and reasonable basis for the choice of

1 law at the initial step. See, e.g., Peleg, 204 Cal. App. 4th at
2 1446-47; Ruiz v. Affinity Logistics Corp., 667 F.3d 1318, 1323 (9th
3 Cir. 2012). Accordingly, the Court finds that there is a
4 "substantial relationship" to the parties and a "reasonable basis"
5 for the parties' choice of law.

6 **ii. Fundamental Policy**

7 The Court next considers whether Oklahoma's laws are contrary
8 to a fundamental policy. Here, Plaintiff offers several potential
9 policies that might be frustrated: (1) that there are differences
10 between the California and Oklahoma legal standards for
11 unconscionability; (2) that Oklahoma law permits unilateral
12 contract modifications whereas California law does not; and (3)
13 Oklahoma's consumer protection law is far less strong than
14 California's, which includes a robust punitive scheme and anti-
15 waiver provisions. The Court finds the first argument unlikely to
16 reflect a fundamental policy, rejects the second argument, but
17 agrees with the third argument, and therefore finds that Oklahoma's
18 laws are contrary to a fundamental policy.

19 The Court finds the differences between the California and
20 Oklahoma law to be real but minimal. The FAA provides that
21 arbitration agreements are "valid, irrevocable, and enforceable
22 save upon such grounds as exist at law or in equity for the
23 revocation of any contract." 9 U.S.C. § 2. This "savings clause"
24 preserves generally-applicable state law contract defenses like
25 unconscionability, provided they do not single out arbitration
26 agreements or otherwise undermine the purposes of the FAA. See
27 Concepcion, 131 S. Ct. at 1748.

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Under California law, unconscionability "'has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.'" Kilgore v. KeyBank Nat'l Ass'n, 673 F.3d 947, 963 (9th Cir. 2012) (quoting Armendariz v. Found. Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (Cal. 2000)). Conversely, unconscionability under Oklahoma law does not separately consider procedural versus substantive factors:

The basic test of unconscionability of a contract is whether under the circumstances existing at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party.

Barnes v. Helfenbein, 548 P.2d 1014, 1020 (Okla. 1976).

Plaintiff suggests this has been recently interpreted to require a showing of "gross inequality of bargaining power." Been v. O.K. Indus., Inc., 495 F.3d 1217, 1237 (10th Cir. 2007). However, further review shows that "gross inequality" is just one circumstance that usually leads to a finding of unconscionability, rather than an updated test. Id.³ Thus the standards do appear substantially similar. Moreover, differences resulting from

³ Both Barnes and Been reference or expound upon Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. . . . Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.").

1 application of a procedural law like unconscionability are unlikely
2 to reflect a fundamental policy choice.

3 Defendant asks the Court to accept that "there is no
4 meaningful difference in the standards." Supp. Reply at 2. While
5 there might be some reason to suspect Defendant is in error -- that
6 the laws of the two states are not the same -- such a finding would
7 favor application of California's law. Even so, the Court finds
8 below that a different fundamental policy at issue, so the Court
9 ultimately does apply California law, mooted this concern.

10 Next, Plaintiff argues that permitting unilateral contract
11 modifications is contrary to a fundamental policy. Even taking as
12 true Plaintiff's assertion that Oklahoma law permits unilateral
13 contract modifications whereas California law does not, Plaintiff's
14 arguments fail.

15 The Court agrees that, in this limited instance, Concepcion's
16 preemption rulings will not invalidate the choice of law. See
17 Concepcion, 131 S. Ct. at 1748. In Mortenson, a long-standing
18 Montana contract policy was found preempted by the FAA per
19 Concepcion because the policy would often operate to invalidate
20 arbitration clauses. Mortensen v. Bresnan Communs., LLC, 722 F.3d
21 1151, 1161 (9th Cir. 2013). Plaintiff asserts Mortensen also
22 stands for the principle that fundamental policies are based on
23 contract law and not limited to arbitration. Supp. Oppn at 5.
24 Mortensen clarified that it found the general contract law
25 preempted because, as interpreted by the Montana Supreme Court, it
26 would always disfavor arbitrations. Mortensen, 722 F.3d at 1160.

27 Here, there is a legitimate concern that laws of another state
28 could disfavor application of choice-of-laws in favor of another

1 state's laws. However, unlike in Mortensen, there is no indication
2 or history of use within California connecting the disallowing of
3 unilateral contracts with the invalidation of otherwise permissible
4 arbitration clauses. The choice-of-law issue here is no more
5 concerning as related to arbitration than it would be if this were
6 an agreement for consideration by any other judicial body. By the
7 same token, there is no indication that this is a fundamental
8 policy.⁴ The Court thus turns back to the restatement: "[a] forum
9 will not refrain from applying the chosen law merely because this
10 would lead to a different result than would be obtained under the
11 local law of the state of the otherwise applicable law."
12 Restatement (Second) of Conflict of Laws, § 187, comment g.
13 Therefore, while the Court agrees with Plaintiff's argument that
14 Concepcion does not change the California unconscionability
15 analysis or in this specific instance necessitates Federal
16 preemption, the Court's analysis does not provide Plaintiff the
17 desired relief. The Court finds that this particular difference of
18 contract law does not constitute a fundamental policy and is
19 therefore not substantive.⁵

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21 _____
22 ⁴ If there was such a policy, it might be the type of thing that
would be preempted under the Court's analysis of Concepcion.

23 ⁵ Defendant suggests that contract law is, generally, not a
24 fundamental policy. Brack v. Omni Loan Co., Ltd., 164 Cal. App.
25 4th 1312, 1323-24 (Cal. App. 4th Dist. 2008). However, Brack
26 reaches the conclusion that general rules of contract law will
27 "rarely" be based on its analysis of whether parties can legally
28 contract to avoid a policy or whether such a contract would violate
statute -- an analysis which features application of Discover Bank
v. Super. Ct., 36 Cal. 4th 148, 174 (2005). However, the rule from
Discover Bank was expressly found preempted by the United States
Supreme Court in Concepcion. 131 S. Ct. at 1753. Therefore, the
Court finds Brack unpersuasive and follows the binding precedent of
Mortensen.

1 The Court agrees, however, with the Plaintiff's argument that
2 there is a substantial interest at stake in application of
3 California versus Oklahoma's consumer protection law. The Court
4 agrees that Oklahoma's law is far less strong than California's,
5 and Plaintiff correctly cites the Court's pre-Concepcion order.
6 Supp. Opp'n at 5. Antiwaiver provisions of the California Legal
7 Remedies Act (such as those as cited by Plaintiff) cannot be used
8 to preclude arbitration agreements. See Concepcion, 131 S. Ct. at
9 1747-48. But where the California legislature included an
10 antiwaiver provision, it is reasonable to conclude that they were
11 attempting to create a fundamental right. If interpreted to
12 effectuate disfavoring arbitration, certainly the FAA per
13 Concepcion would preempt the statute and language. Here, however,
14 the antiwaiver provision is cited merely to underscore the
15 importance of the California law, and the right lost is all
16 protections afforded under the law. The issue, then, is that
17 choice-of-law results in a fundamental policy harm irrespective of
18 whether this case is heard at arbitration or by a judge.

19 Thus the Court concludes there is a fundamental policy
20 conflict in the laws of Oklahoma versus California.

21 **iii. Materially Greater Interest**

22 If there was no such conflict of laws, the Court would be
23 required to enforce the parties' choice of law. Peleg, 204 Cal.
24 App. 4th at 1446. Where, as here, there is a conflict, the last
25 step in the choice-of-laws analysis is whether California has a:

26 'materially greater interest than the chosen state in
27 the determination of the particular issue' If
28 California has a materially greater interest than the
chosen state, the choice of law shall not be enforced,
for the obvious reason that in such circumstance we

will decline to enforce a law contrary to this state's fundamental policy.

Id. (quoting in part Nedlloyd, 3 Cal. 4th at 466).

Having found a substantial interest, the Court is satisfied California's interest is material, and thus is concerned here with whether its interest is greater than that of Oklahoma. In answer thereto, the Ninth Circuit's analysis in Pokorny is highly instructive. There, Defendants argued Quixtar ADR provisions should have been evaluated using Michigan's unconscionability law vice California's. Pokorny 601 F.3d at 994. Pokorny differs with our case here in that it applied a governmental interest test to which the parties had, in effect, assented. Id. The second prong of that test was examination of "each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." Id. at 994-95. Defendants there argued Michigan had an interest because it was the place of the corporate headquarters and Michigan had an interest in providing its companies with a consistent body of law on which they could rely nationwide. However, Pokorny found in favor of the Plaintiffs, three individuals from California, on the following basis: they had no discernable connection to Michigan; Michigan thus had little to no interest in applying its own procedural unconscionability laws to their challenge; California had a substantial interest in applying its procedural laws; there was no true conflict of laws; and even had there been one California's considerably stronger interest would prevail. Id. at 995-996.

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1 Here, the factual circumstances are almost identical to
2 Pokorny.⁶ Plaintiff is an associate bringing suit against an
3 employer under an arbitration clause. He has never worked in
4 Oklahoma and never visited Oklahoma. ECF No. 61-2, ¶¶ 3-4
5 ("Savetsky Supp. Decl."). All his contact with the Defendant
6 Oklahoma corporation has been in and through California. Oklahoma
7 thus has no greater interest in application of its procedural
8 unconscionability law here than Michigan had in Pokorny. So too
9 California has as much interest in application of its procedural
10 law here as it did in Pokorny. Accordingly, California thus has a
11 materially greater interest in applying its own laws.

12 Ruiz also favors a finding for Plaintiff. See Ruiz, 667 F.3d
13 at 1324. The test there, which is the same as the one applied
14 here, requires that for this third prong the Court "must analyze
15 the following factors: (1) the place of contracting; (2) the place
16 of negotiation of the contract; (3) the place of performance; (4)
17 the location of the subject matter of the contract; and, (5) the
18 domicile, residence, nationality, place of incorporation, and place
19 of business of the parties." Id. Here, all but the last factor
20 favors the Plaintiff. He contracted, "negotiated" (or at least
21 agreed to) the contract, and performed the contract in California,
22 and the subject matter of the contract was all in California. Also
23 like in Ruiz, there is no evidence suggesting Oklahoma has any
24 material interest in the resolution of this case. Id. at 1324-25.

25 ///

26 ⁶ The tests being applied are slightly different, but they are
27 substantially similar, requiring determination of which state has
28 the "materially greater interest." Materiality has been determined
per the discussion above, leaving only the overlapping issue of
which state's interest is greater.

1 Therefore, the Court finds that California has a materially greater
2 interest in application of its laws.

3 Accordingly, the Court applies California law to the limited
4 question of whether or not the arbitration clause is enforceable or
5 unconscionable.⁷

6 **D. Parol Evidence**

7 Plaintiff argues that the parol evidence rule bars LegalShield
8 from attempting to enforce the Membership Contract's arbitration
9 provisions by pointing to the arbitration provision in the
10 associate agreement. This argument fails. Under California law,
11 when parties enter into an integrated written agreement, extrinsic
12 evidence of a prior agreement may not be used to contradict or
13 alter the terms of the written agreement. See Riverisland Cold
14 Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n, 291 P.3d 316,
15 318 (Cal. 2013); see also Cal. Code Civ. Proc. § 1856(a).⁸
16 However, LegalShield is not seeking to contradict or alter the
17 terms of the (latter) written membership agreement -- it is merely
18 seeking to enforce the terms of the (prior) associate agreement

19
20 ⁷ Insofar as Defendants might desire to argue that the Oklahoma
21 unconscionability standard may be more favorable to their case or
22 mandates a different result (as it does not differentiate between
23 procedural and substantive unconscionability), the Court notes that
24 Defendant asks the Court to conclude that "there is no meaningful
25 difference in the standards." Supp. Reply at 2. Therefore, even
26 had the Court accepted Defendant's arguments and applied Oklahoma
27 law, Defendants must accept that the results would be the same.
28 That said, the Court need not consider and does not consider
whether the clause would have been enforceable under Oklahoma law.
⁸ Oklahoma law is similar. The Oklahoma Supreme Court ultimately
"declines to look beyond the four corners of the Contract to
examine the parties' intent further [when] the language employed is
unambiguous." Romine v. Pense (In re Estate of Metz), 2011 OK 26,
P13-14 (Okla. 2011) ("In the absence of fraud, accident, mistake or
absurdity, the clear and explicit language embodied in the written
instrument governs in determining the parties' true intent."); see
also 15 Okl. St. §§ 2A-202, 152, 154.

1 without reference to any extrinsic evidence at all. To put it
2 another way, LegalShield is not seeking to enforce the arbitration
3 provision in the (latter) membership agreement by pointing to the
4 arbitration provision in the (prior) associate agreement; it is
5 seeking to enforce the (prior) arbitration provision in the
6 associate agreement by pointing to the arbitration provision in the
7 (prior) associate agreement. While in some instances an
8 integration clause might bar this approach, the Court has
9 previously (at Plaintiff's own urging) found that Plaintiff did not
10 consent to the membership agreement, and therefore neither side
11 would be bound by the terms therein -- the integration clause or
12 the arbitration clause. Therefore, Plaintiff cannot now claim that
13 parol evidence or an integration clause can require limitation to
14 the terms of the membership agreement. Moreover, even if the
15 membership agreement was still valid (which it is not), the terms
16 of the membership agreement are consistent with the associate
17 agreement insofar as both require arbitration. See Order of the
18 Court filed February 12, 2015, ECF No. 33; ECF No. 42-3, Exhibit G
19 at 47. As a result, the parol evidence rule is irrelevant.

20 **E. Scope of the Associate Agreement**

21 Even if the Court finds the arbitration and choice-of-law
22 provisions valid, Plaintiff asserts that the terms of the associate
23 agreement do not apply to the separate Membership Contract.
24 Plaintiff is incorrect. Plaintiff entered into the Associate
25 Agreement first. The agreement, if valid, clearly contemplates
26 that arbitration shall be used for "[a]ll disputes and claims
27 related to LegalShield . . . products and services . . . or any
28 other claims or causes of action between the Associate or

1 LegalShield . . . whether statutory in tort in contract or
 2 otherwise" Associate Agreement at 6. The first quoted
 3 clause on its own is likely broad enough to be sufficient, and
 4 certainly the additional quoted clauses make it clear that an
 5 Associate is subjecting to arbitration for almost anything at all
 6 relating to LegalShield. The scope of an arbitration provision is
 7 governed by federal law. See Tracer Research Corp. v. Nat'l Envtl.
 8 Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994). Federal law
 9 requires arbitration clauses be liberally construed, with all
 10 doubts resolved in favor of arbitration. See Chiron Corp. v. Ortho
 11 Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000); Simula,
 12 Inc. v. Autoliv, Inc., 175 F.3d 716, 719-720 (9th Cir. 1999); see
 13 also Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 797-98
 14 (10th Cir. 1995); P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861,
 15 871 (10th Cir 1999). Here, the language is even broader than the
 16 cases cited by LegalShield that discuss "[a]ll disputes arising in
 17 connection with this Agreement . . . ," or "[a]ny disputes related
 18 to this Agreement or its enforcement . . . ," and, unlike those
 19 cases, encompasses claims both related and unrelated to the
 20 associate agreement. See Simula, 175 F.3d at 720 (emphasis
 21 omitted); In re TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-
 22 1827 SI, 2011 WL 2650689, at *3-5 (N.D. Cal. July 6, 2011).

23 While the Court might be more sympathetic to Plaintiff's
 24 argument if made by a member who then later became an associate, it
 25 is not unreasonable for an associate to expect that he would be
 26 bound by different and more stringent rules when he later becomes a
 27 member (as compared to those who are solely members). This is
 28 especially true where Savetsky knew or reasonably should have known

1 he had already agreed to some form of binding contract that may
2 have (and here did) limit his rights as to "products and services"
3 and "any other claims or causes of action" that Plaintiff had.
4 Therefore, Plaintiff's claims made in the posture of simply being a
5 member are bound by all valid provisions of his earlier signed
6 Associate Agreement. Signing a later contract (in this instance)
7 did not release or reduce his existing obligations. Because
8 Plaintiff's claims are clearly related to LegalShield (as opposed
9 to the associate agreement), relate to LegalShield products and
10 services, and are (at the very least) other claims between Savetsky
11 and LegalShield, this case clearly falls within the scope of the
12 arbitration clause in the associate agreement.

13 **F. Unconscionability**

14 Plaintiff asserts that the associate agreement is
15 unconscionable, and hence unenforceable. In California, a finding
16 of unconscionability requires "a 'procedural' and a 'substantive'
17 element, the former focusing on 'oppression' or 'surprise' due to
18 unequal bargaining power, the latter on 'overly harsh' or 'one-
19 sided' results." Concepcion, 131 S. Ct. at 1746 (citations
20 omitted). For the reasons set forth below, the Court agrees that
21 parts of the associate agreement are unconscionable under
22 California law and therefore cannot be enforced. However, because
23 the severability clause may operate to save the arbitration clause
24 and the Court is required to read the contract resolving any
25 ambiguity in favor of arbitration, the Court finds the severability
26 clause does operate to save the agreement to arbitrate. Therefore,
27 despite ultimately striking some language as unenforceable, the
28 Court finds that an arbitration is required.

1 The Court rejects Plaintiff's concerns over the size and
2 length of the agreement. Two pages in all 8-point type is easily
3 legible and is not so long that anything can be truly obfuscated by
4 its placement. The Court is also satisfied that Plaintiff has been
5 able to access a copy of the AAA rules, eliminating or minimizing
6 any harm therefrom. Thus, any procedural unconscionability in
7 failing to provide the AAA rules that may exist is minimal and does
8 not substantially sway the Court's analysis.⁹

9 Plaintiff cites Chavarria v. Ralphs Grocery Store, 733 F.3d
10 916, 922 (9th Cir. 2013) for the proposition that a take-it-or-
11 leave-it contract is procedurally unconscionable under California
12 law. Chavarria goes on to find still greater procedural
13 unconscionability in the circumstances of that case, where
14 plaintiffs were required to agree to terms weeks after beginning a
15 job, and where the terms applied irrespective of agreement. Id. at
16 923. However, Chavarria still finds that there was procedural
17 unconscionability simply by virtue of being a take-it-or-leave-it,
18 "standardized contract, drafted by the party of superior bargaining
19 strength, that relegate[d] to the subscribing party only the
20 opportunity to adhere to the contract or reject it." Id. Cases
21 cited by Defendant to the contrary are all district court cases
22 decided prior to Chavarria, which itself was decided after

23
24 ⁹ See A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 489
25 (1982) ("Generally, courts have not been solicitous of businessman
26 in the name of unconscionability"); Captain Bounce v. Business Fin.
27 Services, No. 11-CV-858 JLS (WMC), 2012 WL 928412 *7 (S.D. Cal.
28 Mar. 19, 2012) ("Plaintiffs' status as merchants, not consumers, is
undoubtedly a factor properly considered in the Court's
unconscionability analysis, as it is reasonable to expect even an
unsophisticated businessman to carefully read, understand, and
consider all the terms of an agreement affecting such a vital
aspect of his business.").

1 Concepcion. Reply at 7. The Court must therefore decline to
2 follow these persuasive authorities in favor of binding precedent
3 from the Ninth Circuit. Accordingly, the Court finds there is a
4 degree, albeit the lesser degree, of procedural unconscionability.

5 This in no way negates the Court's earlier finding rejecting
6 that adhesion alone makes the associate agreement invalid nor
7 impacts the Court's earlier finding that there is sufficient
8 "mutual manifestation of assent, whether by written or spoken word
9 or by conduct, [to satisfy] the touchstone of contract." Nguyen,
10 763 F.3d at 1175. Rather, California unconscionability is a
11 sliding scale test. Chavarria, 733 F.3d at 922. Both procedural
12 and substantive unconscionability are required, and "greater
13 substantive unconscionability may compensate for lesser procedural
14 unconscionability." Id. Thus the Court next considers whether
15 there was substantive unconscionability, and if so whether it was
16 to the degree necessary.

17 A contract term is not substantively unconscionable when it
18 merely gives one side a greater benefit; rather, the term must be
19 "so one-sided as to 'shock the conscience.'" Pinnacle Museum Tower
20 Assn. v. Pinnacle Market Development (US), LLC, 55 Cal. 4th 223,
21 246 (Cal. 2012). Here, Plaintiff suggests that overly harsh, one-
22 sided results sufficient to meet this requirement can be found in
23 the unilateral rights provided to Defendant, the location of the
24 forum, and the costs Plaintiff might bear under the AAA Commercial
25 Rules. The Court considers each in turn.

26 Plaintiff objects that the arbitration clause grants
27 unilateral rights only to the Defendant. In relevant part, the
28 Associate Agreement states: "Associate understands and expressly

1 agrees that LegalShield may seek a temporary restraining order
2 and/or preliminary injunction in state or federal court to maintain
3 the status quo pending determination of the dispute." Associate
4 Agreement at 6. Defendant provides an effective critique of
5 Plaintiff's argument, see Reply at 9-10, but fails to note that it
6 is the Defendant who initially sets the status quo, and thus one
7 might expect the status quo will more frequently favor the
8 Defendant. Thus the Court is concerned that this clause does
9 provide the Defendant some advantage in being the only side which
10 may seek injunctive relief. Moreover, if Defendant is correct that
11 both sides can still seek injunctive relief, there seems to be no
12 benefit to the clause. The Court therefore finds that this clause
13 does create some amount of substantive unconscionability. But the
14 Court also agrees with Defendant that the clause can be easily
15 severed -- a matter the Court will take up below.

16 Plaintiff also objects to the location of the forum in
17 Oklahoma. The Associate Agreement states arbitrations "shall be
18 settled . . . by arbitration in Oklahoma City, Oklahoma. . . ."
19 Associate Agreement at 6. The Court agrees with Plaintiff.
20 Defendant's decision not to enforce this provision now does not
21 change the fact that, upon entry into the contract, the provision
22 indicated a degree of substantial unconscionability.

23 Plaintiff also objects to costs it might bear under the AAA
24 Commercial Rules. The Associate Agreement states arbitrations
25 "shall be settled totally and finally by arbitration . . . in
26 accordance with the Commercial Arbitration Rules of the American
27 Arbitration Association." Associate Agreement at 6. Chavarria is
28 again instructive. There, the underlying district court "cited [as

1 problematic] the preclusion of institutional arbitration
2 administrators, namely AAA or JAMS, which have established rules
3 and procedures to select a neutral arbitrator." Chavarria, 733
4 F.3d at 923. There, Ralphs imposed significant fees up-front on
5 each party seeking arbitration and structured the rules to ensure
6 that Ralphs would usually (if not always) get to pick the arbiter
7 and have certain innate advantages when going into arbitration.
8 See Chavarria, 733 F.3d 923-25. No such concern exists here.
9 There is no fee splitting, merely use of the rules of a well-
10 respected neutral arbitration group. Chavarria cited failure to
11 use such a group as problematic, and noted the Ninth Circuit has
12 failed to assign error where there was "a mere risk" that a party
13 might face a prohibitive cost. Id. at 925-26 (citing Kilgore v.
14 KeyBank National Ass'n, 718 F.3d 1052, 1058 (9th Cir. 2013) (en
15 banc)).

16 Here, the agreement simply selects the ground rules. There is
17 no inclusion of additional fees in the Associate Agreement beyond
18 those set rules, and the AAA rules provide for relief for those
19 unable to pay. Absent evidence that Plaintiff cannot pay or
20 evidence that there is some mechanism designed to increase costs in
21 a manner designed to deprive Plaintiff of a day in court, there is
22 insufficient evidence of substantive unconscionability.

23 Finally, the Court turns to the Severability Clause. The
24 Associate Agreement states that:

25 In the event that a provision of the Associate
26 Agreement or these Policies and Procedures is held to
27 be invalid or unenforceable, such provision shall be
28 reformed only to the extent necessary to make it
enforceable, and the balance of the Agreement and
Policies and Procedures will remain in full force and
effect.

1 Associate Agreement at 6. The FAA and Concepcion make clear that
2 any doubt or ambiguity in the contract should be resolved in favor
3 of arbitration. Plaintiff cites that several California courts
4 have chosen to invalidate an entire contract on the basis of more
5 than one indication of substantive unconscionability. See Reply at
6 24-25. The Court recognizes that "an arbitration agreement
7 permeated by unconscionability, or one that contains unconscionable
8 aspects that cannot be cured by severance, restriction, or duly
9 authorized reformation, should not be enforced." Armendariz, 24
10 Cal. 4th at 126. Here, however, the Court finds that there is a
11 reasonable means and basis to save the contract. The Court has
12 already found that there was a sufficient "mutual manifestation of
13 assent" and dicta indicating acceptance of this precise type of
14 contract by the Ninth Circuit. See Nguyen, 763 F.3d at 1175-76.
15 Enforcement of those portions not found (above) to contain
16 unconscionable agreements does not favor or disfavor either side in
17 a manner that runs contrary to the interests of justice. See
18 Armendariz, 24 Cal. 4th at 126-27. Therefore, the Court severs and
19 finds unenforceable the clause limiting injunctive relief to only
20 Defendant and locating any arbitration in Oklahoma. Language
21 relating to filing orders in Oklahoma and consenting to
22 jurisdiction there does not foreclose other options (such as filing
23 an order with this Court) and thus do not yet pose any concern.
24 The remainder of the contract stands.

25 26 **V. CONCLUSION**

27 For the above reasons, the Court SEVERES and STRIKES the
28 language below with a cross-through from the associate agreement:

1 1. ~~"totally and finally by arbitration in Oklahoma~~
2 ~~City, Oklahoma,"~~

3 2. ~~"However, Associate understands and expressly~~
4 ~~agrees that LegalShield may seek a temporary~~
5 ~~restraining order and/or preliminary injunction in~~
6 ~~state or federal court to maintain the status quo~~
7 ~~pending determination of the dispute."~~

8 The remainder of the associate agreement remains valid.
9 Accordingly, the Court hereby ORDERS that parties proceed to
10 binding arbitration in accordance with the (remaining) terms of the
11 agreement. The hearing and proceedings, under such agreement,
12 shall be within this judicial district. See 9 U.S.C. § 4. The
13 Court STAYS this case pending results of the above ordered
14 arbitration.

15 Still-valid language in the associate agreement consents to
16 entry of judgment in Oklahoma yet not in California, but does not
17 actually foreclose enforcement in California. Therefore, the stay
18 notwithstanding, within 20 days of this order, the Court ORDERS
19 Defendant to SHOW CAUSE why any judgment resulting from this
20 arbitration cannot be filed in and enforced by the Court or another
21 judicial body within California. Alternatively, Defendant may
22 during those same 20 days stipulate to the continued jurisdiction
23 of the Court to enforce the results of the arbitration the Court
24 has ordered herein.

25 IT IS SO ORDERED.

26 Dated: July 30, 2015



UNITED STATES DISTRICT JUDGE